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IN THE

Supreme Court Of The United States

October Term 1983

UNIVERSITY COLLEGE OF THE UNIVERSITY OF ALABAMA IN BIRMINGHAM; GEORGE W. CAMPBELL, etc., et al.,
Petitioners,

v.

MARTHA JOHNSON and DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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III. QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the trial judge failed adequately to substantiate his findings?

2. What standard of appellate review is appropriate in attorney fee litigation?

3. Did the court of appeals err in requiring an adjustment of plaintiffs' attorneys fees to reflect delay in payment?

4. Did the court of appeals err in reviewing the district court's reduction for reconstructed time?

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MARTHA JOHNSON and DELORES J. CEBALLOS, individually and on behalf of others similarly situated,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, University College of the University of Alabama in Birmingham; George W. Campbell, et al.,[1] respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on June 10, 1983.

[1]The Board of Trustees of the University of Alabama, Joseph F. Volker, President of the University of Alabama in Birmingham, Frederick W. Conner, Dean of the School of Arts and Humanities of the University of Alabama in Birmingham, and George C. Wallace, President Ex-Officio of the Board of Trustees of the University of Alabama likewise petition this Court to review the decision of the Eleventh Circuit.

I. OPINIONS BELOW

The opinion of the Court of Appeals dated June 10, 1983 is reported at 706 F.2d 1205 and appears in the separate Appendix to this Petition at pages 1-12. The Opinion of the District Court for the Northern District of Alabama also appears in the separate Appendix to this Petition at pages 12-26.

II. JURISDICTION

The opinion and judgment of the Court of Appeals for the Eleventh Circuit were entered June 10, 1983. (App. 1). On June 28, 1983, the University filed a petition for rehearing by the original panel. On August 11, 1983, the Court of Appeals denied the University's petition for rehearing without comment. (App. 28). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

III. QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding the trial judge failed adequately to substantiate his findings?

2. What standard of appellate review is appropriate in attorney fee litigation?

3. Did the court of appeals err in requiring an adjustment of plaintiffs' attorneys fees to reflect delay in payment?

4. Did the court of appeals err in reviewing the district court's reduction for reconstructed time?

IV. STATEMENT OF THE CASE

This petition raises fundamental questions as to the role of the appellate courts in reviewing attorney fee award litigation. On June 15, 1979, approximately two weeks before trial was scheduled to begin in this Title VII class action, the parties filed a proposed Consent Decree which was approved by the District Court. In their Consent Decree, the parties agreed to negotiate the amount of attorneys fees, and, if negotiations failed, to submit the fee claim to the District Court. These ef-

forts proved unsuccessful and resulted in protracted discovery and litigation of the issue of attorneys' fees. After a two-day hearing that followed months of discovery on the fee issue, submissions of documentary evidence by all parties, and a pre-trial conference, on September 19, 1980, the District Court awarded plaintiffs interim fees of $50,000, and on September 25, 1981, the Court issued its final opinion and order in which it increased the interim award by $8,183.67. Plaintiffs appealed the trial court's decision arguing that the court had abused its discretion in determining the amount of attorneys fees to be awarded.

On June 10, 1983, the Eleventh Circuit Court of Appeals issued its opinion reversing in part and remanding to the trial judge various issues pertaining to its determination of the attorney fee award. The University filed a petition for rehearing by the original panel asserting that rehearing was necessary by the panel, as the panel had rendered its decision without considering the Supreme Court's recent and controlling decision in *Hensley v. Eckerhart*, ___ U.S. ___, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). The University's petition for rehearing was denied August 11, 1983, without comment.

V. REASONS FOR GRANTING THE WRIT

1.

The Decision Below By The Eleventh Circuit Court Of Appeals Conflicts With Important Decisions Of Other Appellate Courts Respecting the Substantiation Required to Support a Trial Court's Discretion in Awarding Attorneys Fees and Respecting the Appellate Court's Role in Reviewing that Discretion.

Most notably, the opinion of the Eleventh Circuit conflicts with decisions of other appellate courts with respect to the burden the District Court must bear in substantiating its findings. Contrary to the procedure established in other circuits, the Eleventh Circuit engaged in extensive scrutiny and second-guessed the explanations for the District Court's exercise of its

discretion. Moreover, in several instances the panel reversed or remanded an issue to the trial judge when the Appellate Court disagreed with the District Court's analysis of the record or when the panel felt that the District Court failed adequately to substantiate its findings.[2] If the principals enunciated and approach applied by the Eleventh Circuit here are to be followed by district courts in this Circuit, district judges may reasonably question what lengths they must go to in substantiating their findings.

For example, here the trial judge made specific findings with respect to certain factors enunciated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974), "the amount involved and the results obtained", and "the novelty and difficulty of the questions"; notwithstanding *Eckerhart's* holding that only "in some cases of exceptional success an enhanced award may be justified", the Eleventh Circuit rejected these findings and substituted its own analysis of these factors *without* finding the district court abused its discretion in evaluating these factors. The trial judge specifically held that it "did not find this case to involve any novel or unusually difficult questions of law" (R. 302). With respect to the results obtained, the court noted

> [I]n examining the results obtained in this case, the court must note that only *five* individuals out of the potential class of 112 (excluding the two named) plaintiffs have sought to advance a claim. The lack of interest by the class precludes this litigation from being characterized as watershed litigation.

(R. 306)[3] However, the appellate court makes assumptions to the contrary by referring to plaintiff's "significant victory". In

[2]This is not an isolated instance of the Eleventh Circuit's perception of its role in reviewing attorneys fee litigation. *Morgado v. Birmingham-Jefferson Cty. Civ. Defense,* 706 F.2d 1184 (11th Cir. 1983), issued the same day by the same panel, likewise engaged in such appellate factfinding and impermissible substitution of the appellate court's judgment for that of the District Court.

[3]Furthermore a review of the record indicated that although the plaintiffs vigorously sought a University-wide class, ultimately the class certified

so doing, the Eleventh Circuit ignored the District Court's judgment, yet did not make a finding that the District Court abused its discretion in evaluating the case's importance.

Another example of the Eleventh Circuit's disregard for the trial judge's analysis of the record and substitution of its judgment for that of the District Court is found in its reversal of the District Court's deletion of duplicative hours based on its finding that the "record does not sustain its rejection" and due to the District Court's "fail[ure] to specify any instances of duplicative effort".[4] Thus, the Eleventh Circuit in requiring the district court to itemize the hours it found to be duplicative has adopted a requirement not imposed by other courts of appeal and in fact rejected as too onerous by other appellate courts. In contrast to the Eleventh Circuit's requirement of an hour-by-hour discussion of each attorney's time sheet, other appellate courts have held that the district court need merely explain the basis for its decision sufficiently to permit the court of appeals to determine, on review, whether the record supports its decision. *See Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (en banc) ; *Neeley v. City of Grenada*, 624 F.2d 547 (5th Cir. 1980) ; *Norwood v. Harrison*, 581 F.2d 518 (5th Cir. 1978), *affirming* 410 F. Supp. 133, 142 N. 10 (N.D. Miss. 1976) ; *Kiser*

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was limited to faculty in the School of Humanities—one of six schools in the University College. The University's massive Medical Center was totally excluded. (R. 78-83).

[4]The Eleventh Circuit merely refers to the District Court's exclusion of time spent by out-of-town counsel due to unnecessary duplication. The Court fails to mention that the District Court excluded time for duplicative work at the same time it excluded hours claimed for other unnecessary work and for non-legal work since all hours related to the Johnson factor of "time and labor required".

The amount of hours deleted for duplication, just over 50 hours, constitute less than 5% of the total time claimed. While the District Court did not engage in an hour-by-hour analysis of the 50 hours or identify which tasks in which days it found to be duplicative, the District Court's finding of duplication was supported by the attorneys' time summaries which revealed, *inter alia*, numerous instances where day after day an attorney did nothing other than confer with co-counsel. The District Court weighed the hours claimed against its own knowledge and experience to determine that some of the hours claimed indeed were duplicative.

v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), *aff'd in part rev'd and remanded on other grounds sub nom. Kiser v. Huge*, 517 F.2d 1237 (D.C. Cir. 1974). As the Second Circuit recently stated in affirming the district court's percentage reductions for duplication:

> In similar cases with voluminous fee applications, courts have recognized that it is unrealistic to expect a trial judge to evaluate and rule on every entry in an application. See *Copeland v. Marshall*, 641 F.2d 880, 903 (D.C. Cir. 1980) (en banc) (22% cut); *Ross v. Saltmarsh*, 521 F. Supp. 753, 761-62 (S.D.N.Y. 1981) (5% and 10% cuts), aff'd mem., 688 F.2d 816 (2nd Cir. 1982); *Kane v. Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1056 (S.D.N.Y. 1977) (10% cut), aff'd mem., 578 F.2d 1368 (2d Cir. 1978). These courts have endorsed percentage cuts as a practical means of trimming fat from a fee application.

New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1146 (2nd Cir. 1983). The Eleventh Circuit's remand to the District Court based on its finding that the trial judge failed to specify any instances of duplicative work effort and based on the Eleventh Circuit's perception that the record did not sustain this reduction puts an unusual burden on future district courts to substantiate their findings. District courts in the Eleventh Circuit now face the onerous task, not required of courts in other circuits, of analyzing attorneys' time logs on an hour-by-hour basis in order to support any reduction of time. Such a task is so burdensome it will likely encourage trial courts to accept an attorney's hours even where unnecessary duplication has occurred, with the result that any consideration of duplication will be forgone and the trial court's discretion in this regard will be removed.

Similar disregard of the trial judge's findings of fact were present with respect to the Eleventh Circuit's disposition of the District Court's refusal to compensate plaintiff's attorneys for time spent litigating the fee question. In addition to concluding that the consent decree which governed the attorney fee award did not provide for compensation for time spent on the fee petition, the District Court noted:

> Additionally, it was the plaintiffs that requested the evidentiary hearing which brought into play the full panoply of discovery. It seems inequitable to pay the plaintiffs a premium because they brought on additional litigation after the consent decree, including *time spent filing motions that appear extraneous and unnecessary.*

(R. 301) (Emphasis added).

The Eleventh Circuit, however, held that there was nothing in the record to support the trial judge's conclusion that plaintiffs were responsible for the additional litigation. In view of the trial judge's familiarity with the circumstances giving rise to the additional litigation and in view of the District Court's having presided over the pre-trial conference and fee hearing, surely it is within the District Court's sound discretion to disallow compensation for time spent on the fee issue. By requiring the record to provide evidence as to what actions of counsel were "extraneous and unnecessary",[5] the Eleventh Circuit has departed from the evidentiary standard followed by other appellate courts, which defer to the trial court's judgment on such matters recognizing that the district court is in the best position to evaluate the reasonableness of the time claimed. In so doing, the Eleventh Circuit has substituted its judgment for that of the District Court.

Likewise, the Eleventh Circuit, impermissibly substituted its judgment for that of the District Court with respect to the risk factor in awarding a bonus.[6] A final illustration of appellate

[5]The record revealed no less than seven unsuccessful motions and related memoranda filed by plaintiffs' counsel resisting disclosure of the time and expense records and resisting discovery requests pertaining to the factors enumerated in *Johnson*, which the University had propounded in order to evaluate the reasonableness of plaintiff's fee request. However, the Eleventh Circuit was unwilling to accept the District Court's judgment that such motions reflected wasteful and unnecessary time.

[6]The District Court awarded a 10% contingency bonus. In awarding this bonus the court noted that plaintiffs failed to present any precise evidence regarding the extent of the risk undertaken and furthermore that the contingent nature of the case was reduced by the fact that plaintiffs' attorneys received payment from the Lawyer's Committee for Civil Rights. The District Court noted: "These payments made the financial risk minimal". (R. 305).

factfinding by the Eleventh Circuit is its reversal of the District Court's exclusion of computer expenses which was based on a finding by the District Court that plaintiffs had failed to comply with a court order requiring substantiation of their expenses.[7]

The Eleventh Circuit reversed stating:

> This court has held that an award of attorneys fee should not be *reduced* simply because counsel is receiving compensation from third parties.

Johnson v. Univ. Col. of Univ. of Ala. in Birmingham, 706 F.2d 1205, 1210 (11th Cir. 1983) (emphasis added) (citations omitted). Thus, not only did the Eleventh Circuit substitute its judgment for that of the District Court with respect to the risk factor, but its rejection of the District Court's analysis was also based on a misapplication of prior cases decided by the Eleventh Circuit. Here, the District Court did not reduce plaintiffs' attorneys fees due to their counsel's receiving compensation from third parties. Instead, the trial court merely took this factor, among others, into account in determining the amount by which the court would *increase* the award. There is a material difference between reducing the base award due to counsel's partial compensation from third parties and taking that factor into consideration when analyzing the risk factor for purposes of awarding a bonus.

[7]By court order the plaintiffs were given 15 days to furnish information regarding their request for recovery of computer costs and the Magistrate's recommendation, likewise, cautioned that if "complete documentation is not received regarding expenses claimed by the date determined by the District Court, it is recommended that each such claim be eliminated as the basis for claiming reimbursement." (R. 275). The District Court adopted this recommendation and required plaintiffs to substantiate the expense in advance of the hearing.

It was undisputed that plaintiffs failed to provide any explanation for the computer costs prior to the hearing, yet the Eleventh Circuit remanded to the District Court the issue of the recovery of computer costs, concluding that the court overlooked the plaintiffs' compliance with the court order due to one of the attorney's "willingness to explain the computer cost" at the hearing. It should be noted, however, that the attorney who offered to make the explanation, Ms. Reeves, was not the attorney who had incurred and claimed the expenses. (R. 186 ¶ 11). The Eleventh Circuit's opinion was also based on the fact that the plaintiffs furnished invoices and ledgers; none of these, however, provided the requested explanation for the expense. These errors by the Eleventh Circuit demonstrate the dangers of the standard of review utilized by the Eleventh Circuit as only the District Court was intimately familiar with the circumstances underlying its exercise of discretion.

The preceding discussion demonstrates numerous instances of appellate factfinding and substitution of the appellate court's judgment for that of the trial judge. The approach taken by the Eleventh Circuit is directly contrary to decisions in other circuits which hold that in reviewing the district court's exercise of its discretion, the appellate court is not to substitute its ideas of fairness for those of the district judge absent evidence that he acted arbitrarily and that such evidence must constitute a clear showing of abuse of discretion. *Thornberry v. Delta Air Lines*, 676 F.2d 1240 (9th Cir. 1982); *Copeland v. Marshall, supra*; *Ridgeway v. United Hospitals - Miller Division*, 563 F.2d 923, 927 (8th Cir. 1977); *Comacho v. Colorado Technical College*, 590 F.2d 887 (10th Cir. 1979); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1967); *Louisville Black Police Officers v. U.S.*, 700 F.2d 268 (6th Cir. 1983). The standard established by the Eleventh Circuit conflicts not only with the decisions of other circuit courts on the same subject, but with the general principles originally established by the Fifth Circuit in *Johnson v. Georgia Highway Express* for awarding attorneys fees. The Eleventh Circuit's standard is unique with respect to the heavy burden it places on the District Court and with respect to the liberal role it takes in reviewing such decisions. Moreover, the approach adopted by the Eleventh Circuit prompts district courts in this circuit to speculate as to what type of explanation for the court's findings will suffice when rendering opinions in future attorney fee litigation. Thus, guidance by this court is necessary in order to aid trial judges with respect to the degree of substantiation of their findings that are required in rendering attorneys fee decisions. District courts must have a clear standard in order to assure that they can render effective decisions in attorney fee litigation. Likewise, this Court must address the role of the appellate court in reviewing attorney fee decisions to avoid turning the issue of the amount of attorney fees to be awarded into lengthy, major litigation. Only action by this Court can establish a clear and uniformly-applied standard.

2.

The Eleventh Circuit's Treatment Of Delay In Payment Is Contrary To The Decisions Of Other Appellate Courts.

The courts of appeals have established different standards for determining whether any enhancement for the delay in payment is appropriate. The Sixth Circuit recently held in *Louisville Black Police Officers v. City, supra,* that an adjustment to reflect delay was not warranted where "a relatively few number of years [were] involved . . . (1974 to 1981)." *Id.* at p. 1510. In so holding, the court noted that the bulk of the attorney's services (83.2%) were rendered during 1977 through 1979, thus only a four-year delay was involved. Likewise, in *Northcross v. Board of Education in Memphis City Schools,* 611 F.2d 624 (6th Cir. 1979), *cert. den.* 447 U.S. 911 (1980), the Sixth Circuit, in reviewing a district court's award of attorneys fees in 1977 and again in 1978, made no adjustment in 1980 for inflation with respect to the 1978 award. Instead, the court noted such an adjustment for delay was discretionary and adjusted for inflation only with respect to the 1977 award which involved services rendered as early as 1960 for which plaintiff's attorneys would not be compensated until 1980.

Likewise the Circuit for the District of Columbia has held that an award for delay in payment is discretionary. *National Ass'n of Concerned Veterans v. Sec. of Defense,* 675 F.2d 1319, 1329 (D.C. Cir. 1982); *Copeland v. Marshall, supra*; *Lindy Bros. Building, Inc. v. Am. Radiator,* 540 F.2d 102, 117 (D.C. Cir. 1976). Indeed, the court in *Nat. Ass'n. of Concerned Veterans* stated:

> "No precise formula is available to measure the delay factor. Some delay in receipt in payment is inevitable in the law as in any other service profession. Accordingly, any minimal delay may properly be ignored by the District Court in setting a fee award. Delay solely attributable to dilatory action by the plaintiff should also be discounted."

Nat. Ass'n. of Concerned Veterans of Defense, 675 F.2d at p. 1328.

Contrary to the approach of other circuits, the Eleventh Circuit in *Johnson* held:

> District courts *should* take into account inflation and interest . . . we do not prescribe any set method for correcting for delay in payment, but some form of correction *must be undertaken.*

Johnson v. Univ. Col. of Univ. of Ala. at Birmingham, 706 F.2d 1205, 1210-1211 (11th Cir. 1983) (emphasis added). Thus, here the Eleventh Circuit required such an adjustment, removing this determination from the discretion of the district judge.[8] Resolution of this conflict is necessary.

3.

The Eleventh Circuit's Treatment of Reductions for Reconstructed Time Conflicts with the Supreme Court's Decision in *Hensley v. Eckerhart* and the Decisions of Other Appellate Courts.

The Eleventh Circuit's rejection of the District Court's reduction for reconstructed time was directly contrary to *Eckerhart.*[9] Likewise, the reduction for reconstructed time is contrary to the decisions of various appellate courts. *New York Ass'n for Retarded Children v. Carey, supra* at p. 1147; *National Ass'n of Concerned Veterans v. Secretary of Defense, supra* at p. 1327 (D.C. Cir. 1982); *Clairborne v. Illinois Cen-*

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[8]Here, as in the *Louisville* decision, only five years elapsed between the institution of this action and the time the suit was settled in 1979. Moreover, as in *Louisville,* the majority of the plaintiffs' attorneys' services (71%) were rendered after 1976. Indeed, a significant portion of the time for which reimbursement is requested came after the case was settled. Moreover, as the trial judge noted, plaintiffs' counsel were paid $50,000 in interim fees in 1980. (R 312).

[9]The District Court reduced one-third of the hours claimed by one of plaintiffs' attorneys, Ms. Reeves, due to her failure to maintain contemporaneous time records. This holding ignores *Eckerhart's* express endorsement of a thirty percent reduction in hours claimed due to the failure to keep contemporaneous records. Indeed, this Court held "where the documentation of hours is inadequate, the District Court may reduce the award accordingly". *Eckerhart, supra,* at p. 4554.

tral R.R., 583 F.2d 143, 155 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979); 5th Cir. R. 22.2, reprinted in 693 F.2d No. 3, at lXXiii (Jan. 10, 1980).

VI. CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

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